First Degree, Assault Second Degree, and Assault Third Degree, theretofore reviewed by the Court of Appeals of the State of New York and by the Supreme Court of the State of New York, Appellate Division, Second Department, and also by this Honorable Court, which denied certiorari on January 11, 1971 (400 U.S. 996).

Opinions Below

The opinion of the United States Court of Appeals below is not officially reported yet and is annexed hereto as Appendix A.

The report of Magistrate Goettel dated September 24, 1971, recommending the holding of an evidentiary hearing, is annexed hereto as Appendix B.

Said Magistrate's report and recommendation dated May 17, 1972 is annexed hereto as Appendix C.

The order of United States District Court Judge Irving Ben Cooper dated June 19, 1972, confirming the Magistrate's report, is annexed hereto as Appendix D.

The Court of Appeals of the State of New York, by a four to two vote, officially reported at 27 N.Y. 2d 53, affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, which affirmed without opinion (31 App. Div. 2d 1006) a judgment of conviction following a jury trial in the Nassau County Court rendered on September 22, 1967, wherein petitioner was sentenced to terms of ten to twenty years for Robbery, First Degree, five to ten years for Grand Larceny, First Degree, two and one-half to five years for Assault, Second Degree, and suspended sentence on Assault, Third Degree, all sentences to run concurrently.

Jurisdiction

The jurisdiction of this Court is apparently based upon 28 U.S.C. § 1254 (1), it being argued that there exists a conflict between the Circuit Courts as to the standard to be applied under *Simmons* v. *United States*, 390 U.S. 377, and it being further argued that petitioner was deprived of due process of law (presumably under the Fifth and Fourteenth Amendments to the United States Constitution) by an in-court identification claimed unreliable under the totality of the circumstances.

Constitutional Provisions Involved

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny

to any person within its jurisdiction the equal protection of the laws.

Prior Proceedings

New York State Proceedings

As can be gleaned from the foregoing and the annexed appendices, the petitioner was convicted in the Nassau County Court after a jury trial on September 22, 1967 of Robbery, First Degree, Grand Larceny, First Degree, Assault in the Second and Third Degrees, receiving the aforesaid sentences therefor. The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, Second Judicial Department, *supra*, and on July 1, 1970 the New York State Court of Appeals, *supra*, affirmed the conviction by a vote of four to two. A previous petition for a writ of certiorari was denied by this Court, *supra*, on January 11, 1971.

Federal Proceedings

By order to show cause dated April 6, 1971 Judge Cooper directed respondent to show cause why a writ of habeas corpus pursuant to 28 U.S.C. § 2243 should not be issued. The matter was referred to a Magistrate of the United States District Court for the Southern District of New York on June 22, 1971 for report and recommendation.

By report dated September 24, 1971, *supra* (Appendix B), Magistrate Goettel recommended an evidentiary hearing be held, which hearing was conducted by said Magistrate commencing February 3, 1972.

Because Mrs. Marguerite D'Amora, an identifying witness at the State trial, had retired for reasons of health and had moved to the State of Virginia, she was unable to

attend the hearing, and it was therefore necessary to obtain her deposition upon written interrogatories. Said interrogatories were returned to the Magistrate during the month of May, 1972. Annexed hereto as Appendix E is a copy of Court Exhibit 2, the papers regarding the deposition of Mrs. Marguerite D'Amora.

By report and recommendation dated May 17, 1972 Magistrate Goettel recommended the issuance of a writ of habeas corpus and on June 19, 1972 Judge Cooper confirmed and adopted the Magistrate's report, *supra* (Appendix D).

On July 6, 1972 an order was signed directing respondent to release the relator unless the respondent re-tried him within sixty days, which order was filed in the United States District Court, *supra*, on July 7, 1972.

On July 24, 1972 a notice of appeal from Judge Cooper's aforesaid order was filed by respondent in the United States District Court for the Southern District of New York, and the certified record of the proceedings before the District Court was filed with the United States Court of Appeals on August 29, 1972. The appeal was argued January 31, 1973 and by opinion decided April 17, 1973 (Appendix A), the order of the United States District Court (Cooper, J.) was reversed.

Background and Statement of Facts

On March 18, 1966 two men committed an armed robbery at the State Laundry in the village of Hempstead, Nassau County, New York. Subsequent to that time the petitioner herein and one James F. Castellano were indicted for that and related crimes.

The evidence generally adduced at the trial held in the County Court of Nassau County was analyzed in detail in the brief submitted on behalf of respondent to the Appellate

Division, Second Department, and the page references therein which follow refer to page numbers of the transcript of trial minutes.

THE STATE TRIAL

Marguerite D'Amora testified for the People that she was working as a switchboard operator at the State Laundry, Hempstead, N. Y. on March 18, 1966, when at about 1:10 P.M., a new blue, very shiny car, attracted her attention (332, 333, 336, 337) as it pulled up across the street with two men in it. It made a U-turn and parked near the front door of the office (337). Both men got out of the car and entered her office in a hurry (339) at about 12 feet from her position and she could clearly see their faces (340). She identified the two men in Court, Gonzalez and Castellano, as the same men who entered the office on March 18, 1966 (340-341). She spoke to Gonzalez [to ask if she could help him] as he passed the counter while Castellano remained at the door (342). Gonzalez turned and looked about into the other room and then walked up to her about 1 foot away (342-343), and she saw Gonzalez had a gun in his hand pointed at her, and he said to her, "This is a stick-up, come with me" (344) and "You won't get hurt" (358).

Simultaneously, Castellano said, "Get up" and they escorted her into the hallway at the foot of the stairs (344). Then Gonzalez went back into the next room and escorted another employee, Kitty Clarke, out of the office into the hallway. Castellano was also armed with a gun but it was in his right hip pocket (345).

Gonzalez put a mask on his face (346, 382, 394) and told her, "Show me to the cashier's office" (346, 348). As they walked up the stairs, one of the men followed behind her and one followed Kitty Clarke (346). One

man interrupted a third employee making a telephone call in a booth by removing the receiver from the girl's hand and hanging it up, and took her along with them into the upstairs office (347). As they approached the cashier's office, Mrs. Clapp walked out and inquired, "What is the joke?" The men said something but she didn't remember the words they spoke and Gonzalez went into the cashier's office (349) while Castellano removed another employee from the adjoining office (350), and the employees were rounded up into one room except for the cashier, Mrs. Clapp (351-352), and she heard Gonzalez say to someone in the cashier's office, "Hurry up" (356), and both men then left with one of the men carrying a brief case (356).

The men left, there was a scene of confusion, but the police arrived and she spoke to them (358, 359).

On cross-examination, Mrs. D'Amora testified that she was employed for 14 years at the State Laundry and resided in Lindenhurst for 12 years (365). She gave a description of Gonzalez as the taller man and that he was armed and he put on a mask (371, 382-383), and she described the shorter man (375) as having a heavy beard with a gun in his pocket (376, 377) and piercing eyes (378) and how they affected her (389) at the time. She learned after the robbery that Gonzalez was a former employee but she didn't remember ever seeing him (392).

She testified that she saw defendants at the robbery and thereafter just prior to trial in the courthouse (429-432) and that she was very upset and frightened by the robbery and had required medical attention, and incurred expenses (447-451).

Katherine Clarke testified that she had been employed 15 years by State Laundry and was working downstairs on March 18, 1966 (451, 452) in the early afternoon when she noticed a man going by the switchboard and he re-

turned accompanied by "Peggy" D'Amora, when she asked, "Peggy, where are you going?" as Peggy and the man were going toward the stairs (455). Peggy was in front, followed by the man. The man said, "You come too" (456) and she went along with them to the stairway and realized something was wrong (457). Although the man was near her, she didn't see him clearly (456) even though she followed him up the stairs, at which time she saw the second man, dressed in black with a heavy black beard (457, 461). She didn't see any weapon but felt a hard object pressing against her back as they proceeded up the stairs (463).

She did not identfy the men in Court but described the taller man as 5′ 10″ or 5′ 9″ or 10″ and described the shorter man with the heavy black beard and dark clothes as skinnier than the taller man, who was wearing light tan clothes and he was heavier (460, 465). The taller man put on a ski cap, or mask, which covered his face (470). She told how the employees were ordered into an office adjoining the cashier's office (465-469) and how the taller man went into the cashier's office (473). She saw the man leave the cashier's office but didn't remember if they carried anything out (476) and they walked out together and closed the door as they left the office (477).

Ernestine Pisciotto testified she was employed at State Laundry on March 18, 1966, and was out in the hall telephone booth talking (488) when she saw Mrs. D'Amora and Mrs. Clarke at the bottom of the stairs with two men (490). Castellano came up to her, told her to hang up, took the receiver from her hand, and put it in the cradle of the phone (490-492).

Castellano had a fairly heavy two or three days' growth of beard, darkish-light brown (491), on the day of the robbery. The other man had on a ski mask and

she only could see his eyes and nose (493). He was stocky in build and about the same height as Castellano (493). The stocky man took one of the girls into the cashier's office while Castellano held a gun on her and the other employees and told them to "lie down" (494-495) but no one would lie on the floor because it was dirty. The other man was in the cashier's room and carried out a little blue school bag (496) and he ran out, accompanied by Castellano (497).

Ernestine Pisciotto further testified she learned defendant Gonzalez' name from the newspapers (520) although she did not know who it was when he walked up the stairs (521), but she did recognize Castellano (531) as the man with the beard (534) whom she had observed for 5 or 6 minutes during the robbery (536, 537). A few hours after the robbery, she identified Castellano at the police station, without a beard, as one of the robbers but did not identify the other man (541, 543, 545, 547, 554-557).

One day before she testified, she was shown two photos of Castellano and Gonzalez by the Assistant District Attorney and asked if she could identify them, and she told him she could identify only Castellano (560-563). Mrs. D'Amora and Mrs. Clarke were also present with her and the Assistant District Attorney (568-571) and Mrs. Clarke stated she could not identify either man. Although other witnesses were present, Mrs. D'Amora was not present at the station house when she identified Castellano (578).

Anita Marks testified she was present during the robbery on March 18, 1966, committed by a man with a ski mask and a bearded man, but could not identify Gonzalez or Castellano as the perpetrators (580-584). She saw the men armed with guns, and saw the masked man leave carrying a school bag (585-586). She saw a dark colored,

maybe black or dark blue (587, 590) car pull away fast from the front of the building (591), although she couldn't say whether the perpertrators were in the car as it fled from the scene (591).

Madlyn Clapp testified she was the cashier at State Laundry on March 18, 1966, when two men entered her office walking behind Mrs. D'Amora and Mrs. Clarke (600-606). While a man who was fairly short, fair haired and husky, held a gun on the other employees, the man with a multicolored ski mask armed with a gun removed $456 (currency) and checks from her office safe after she opened it on his demand (605, 606). The masked man was about 5′ 10″ with a stocky build, wearing a short jacket (608) and carried a child's school bag (609, 610, 611). The taller man was masked and he was the one who took the money and checks (621, 623, 625).

Sandy Imbriana testified she was a bookkeeper at State Laundry on March 18, 1966, when a stocky built man about 5′ 10″ wearing a ski mask charged into the cashier's office, armed with a small gun, and said, "I want the money . . . This is no joke lady, I want the money" and threw a valise on her desk (641). He stuck the gun in her side and told her, "I know there is money here" and ordered her to open the safe (642). She called Mrs. Clapp into the room and asked her to open the safe (643, 644, 645) and he grabbed something and she ducked beneath a desk with Mrs. Clapp.

Richard Phillips testified he was employed by TWA and he knew both Gonzalez and Castellano and identified them in the court room (647). On March 18, 1966, he was asleep at home at about 2 P.M. when Gonzalez woke him (648) and asked him to take a ride to Copiague (649). He went for a ride in a '60 or '61 Chevrolet (651) and sat in the center front seat as Gonzalez drove (652) with Castellano

at his right and he went to a diner with Gonzalez while Castellano walked across the street to a barber shop (653) but didn't see him enter the shop. After he ate a sandwich, he and Gonzalez walked across the street and met Castellano waiting outside the barber shop. He appeared different in that he had a haircut and was clean shaven (654) as he appeared to need a shave just prior as his beard was "dark, you know black" (654).

The three returned to their car and proceeded on their journey to Copiague. En route, they stopped at a light and a grey car came alongside. The man in the right front seat hollered something but Gonzalez drove away some 600 or 700 feet when Castellano (after requesting Gonzalez to stop, which request was ignored by Gonzalez), pulled out the ignition key and the Chevrolet stopped. He heard backfire, then a gun shot and he turned and saw a detective with a gun pointed at him. Castellano and he turned again and Gonzalez wasn't there. He had left the car (655-659). He was handcuffed along with Castellano and taken to the police station (659).

Kenneth Block testified he was the office manager at State Laundry, Hempstead, and was present during the holdup on March 18, 1966, and that Gonzalez was a former employee although he did not know him (665, 667). He identified Castellano as one of the gun men (670). He saw Castellano at the police station through a one-way mirror (680) where he was asked if Castellano was one of the parties (681). He was shown two photos, prior to testifying, by a detective which refreshed his recollection (683-686, 729-732, 733-735) and he was able to identify him at the trial some 16 months after the holdup.

Patrolman Francis A. Guzzo testified he was on patrol in the Village of Hempstead on March 18, 1966, shortly

after 1:20 P.M. (738). About 1 mile (743) from the State Laundry, he saw a blue '59 or '60 Chevrolet with license #SK 8919 (741) which he copied down. He identified the operator of that car as Castellano (742) but did not identify the other man. He followed the car a short distance and was about to stop the car, because they had cut him off, when he received a radio message about the robbery. He overtook and passed the vehicle to respond to the scene of the robbery. He gave his information about the car and the passengers to the detectives (740-743, 762, 764).

Detective James Moran testified that he was at the robbery scene shortly after 2 P.M. and was assigned to check automobile registration SK 8919 as possibly connected to the robbery (783-785). He drove to Lindenhurst, together with two other detectives, and found a 1964 blue Corvair with the registration. While one detective went to phone their superior officer of their findings, Detectives Moran and Kreitzman remained at the location of the blue Corvair. Shortly thereafter, a 1960 blue Chevrolet bearing registration SK 8919 (786) approached their location ,and drove by with three male occupants in the front seat. As he observed the blue Chevrolet drive past, he observed Gonzalez as the driver (788). He continued to observe the Chevrolet as it proceeded to the end of the block (789). It made a left turn and went around the block and passed in front of his car again on Wellwood Avenue (790). He proceeded to follow the Chevrolet south on Wellwood Avenue, and pulled alongside it after it turned west onto Straight Path (793). Detective Kreitzman showed his shield and ordered the car to pull over (794).

The driver slowed down as if to pull over and then sped off (794), made another turn traveling north for about 4 or 5 blocks with the police car chasing it with its

siren on (795). At the point where the Chevrolet stopped, the witness pulled up behind it and the driver's door opened and Gonzalez said, "Stop, stop, turn it off" and dashed between two houses (796-797) while Castellano and Phillips remained in the car (798). He then requested assistance of Suffolk Police via his radio (798) and saw Gonzalez again at the First Precinct in Suffolk County (798) about a half hour later (799). At the time of their arrest, Gonzalez and Castellano had about $200 on them (815-816).

Patrolman John Edward Shirvell testified he responded to the aid of Detectives Moran and Kreitzman at about 3:30 P.M. on March 18, 1966 (817). He was advised of the events and began to cruise the area for the driver of the car (818). He saw him ¼ mile from the location (820) at a phone booth, and saw Gonzalez run from the booth along Sunrise Highway (820) and chased him by car and by foot near a wooded area where he ordered him to stop. He fired a shot at him (821) and a second shot a short time later during the chase (822) as Gonzalez ran into the woods.

He radioed for assistance and continued his search for Gonzalez as he circled the woods (825). A helicopter joined in the search (826) and he saw Gonzalez again as he was wrestling with another policeman (826). He handcuffed Gonzalez and delivered him to the detectives at the First Precinct, Suffolk County (827).

Patrolman Jeffrey J. Carter testified he apprehended Gonzalez as he came out of the woods (831) when he was able to overtake him (832). He was joined by Patrolman Shirvell (833).

The Federal District Court Hearing

At the hearing before the Honorable Gerard L. Goettel the respondent, People of the State of New York, produced

Robert W. Shebar, Esq., a former Assistant District Attorney, Mr. Kenneth Block, an employee of the State Laundry of Hempstead, and Detectives Howard Herold and James Moran of the Nassau County Police Department, who took part in the investigation of the robbery in question.

Of course, the interrogatories of Mrs. D'Amora were made exhibits before the Magistrate, as well as the original transcript of the trial transcript of minutes.

Summary and Totality of All the Facts and Circumstances

On May 18, 1966, two men committed an armed robbery of the State Laundry in Hempstead, Nassau County. One of the men entered the premises and approached Marguerite D'Amora, the switchboard operator and told her that he and his partner were there to commit a robbery. He brought her over to the second man who entered the premises and went into the back room of the reception area, and brought out a second woman, one Kitty Clarke. At this point, the taller of the two perpetrators put on a ski mask. The two men conducted these two women upstairs to the cashier's office where they held them, and a number of other employees, at bay while the safe was rifled and cash and checks removed.

Subsequent thereto, the two men made their escape. The vehicle operated by the two men was observed leaving the area by a Hempstead Police Officer and Nassau County detectives went to the area where they believed that the car with the plate number described was located. On their arrival, they found that the vehicle with the plate number given them by the Hempstead Town Police Officer was not the vehicle he had described to them.

While a check was being made to verify the accuracy of the plate number, the officers observed a vehicle with a vehicle identification plate number one digit less than the original plate number given them, said plate being attached to a vehicle matching the description of the vehicle observed by the officer at or near the scene of the crime.

The officers gave chase and James Castellano was immediatly taken into custody and as a result of an alarm given by the Nassau County Police, Manuel Gonzalez, the relator herein, was arrested approximately one mile from the place where Castellano was taken into custody. Upon arrival in Suffolk County Police station, both Castellano and Gonzalez confessed their implication in the crime.

As we read the record of the hearing before Magistrate Goettel, that confession given by the relator herein was voluntarily made. As a result of that confession, the relator herein went to a refuse can at or near the place he escaped from the vehicle, and turned over to police the checks taken in the robbery. Other property was also recovered as a result of statements given by the defendant and by his help in retrieving this property including the weapons and clothing used during the commission of the crime.

Prior to this occurrence Marguerite D'Amora, the only witness who could specifically identify the defendant, gave a description of the defendant to the police. She described the relator as a male white, 5′ 10″ tall, stocky build, 26 years old, blond hair. The photo of the relator before the Court indicates that he is a male white, between 5′ 8″ and 5′ 9″ tall. He weighed 194 pounds and was 27 years 2 months old, at the time of the crime. His hair is not blond but is brown or black.

Approximately two months after the commission of the crime (May 12, 1966), the identification witness, Marguerite D'Amora, appeared before a Nassau County Grand Jury and was shown two photographs, one of the relator, and one of his co-defendant, and she identified each as the persons who committed the robbery on March 18, 1966.

Immediately prior to her testimony at the trial (on or about August 15, 1967), she was shown one photo of the defendant. During the trial, she identified the defendant as the perpetrator of the crime. This was the only identification testimony offered against the defendant. The other evidence which was introduced at the trial against the relator involved his presence in the vehicle, and his flight from the vehicle.

Prior to the commencement of the trial of the defendant, the Supreme Court of the United States decided *Miranda* v. *Arizona*, 384 U.S. 436. As a result of the decision in *Miranda*, and the retroactivity determination in *Johnson* v. *New Jersey*, 384 U.S. 719, the confession and the mountain of other evidence secured as a result of the confession was rendered inadmissible at the defendant's trial.

Reasons for Denying the Writ

I. No real conflict in the Circuits and in the New York State Court of Appeals

This Court has on at least three separate occasions pronounced the test to be applied in identification cases where there is a possibility of denial of due process (*Stovall* v. *Denno*, 388 U.S. 293 [1967]; *Simmons* v. *United States*, 390 U.S. 377 [1968]; *Neil* v. *Biggers*, 409 U.S. 188 [1972]).

In *Simmons* v. *United States*, this Court said that a conviction would be set aside on the ground of denial of due process only if:

> "the pretrial identification procedure was so impermissibly suggestive as to give rise to a *very substantial* likelihood of *irreparable* misidentification." (Emphasis added.)
>
> "This determination [is] to be made in *light of the totality of the circumstances* of the case." (*Stovall* v. *Denno*, *supra*, at 302; *Simmons* v. *United States*, *supra*, at 383).

This Court's statement in *Neil* v. *Biggers*, *supra*, appears to have clarified the area even further.

> "The central question was not whether the procedures were suggestive, but whether, under the *totality of the circumstances* the identification made gave rise to a clear danger of mistaken identification." (Emphasis added.)

The gravamen of the issue now becomes, was the identification correct. If there is doubt as to a proper identification, the suggestiveness of the showup becomes of material importance. It is contended that the suggestiveness of the showup is of no moment if it can be shown that the identfication was correct, under the totality of the circumstances.

The theme that recurs time and time again throughout the cases of this Court and of the lower courts in identification due process cases is the possibility of the conviction of the innocent. Initial misidentificaton at the investigative stage under circumstances where that misidentification is "irreparable" are all the evils condemned.

No per se rule governs the due process cases; the question is one of accuracy of the identification (*Rutherford* v. *Deegan*, 406 F. 2d 217, 218-219, *cert. den.* 395 U.S. 983 [1969]).

From all the cases it is clear that this Court's position is that one must look to the *totality of the circumstances* to decide the due process question, when there has been an impermissible suggestive showup and there is a substantial likelihood of a misidentification.

The Second Circuit has followed this Court's pronouncement of the test, espousing it in *Carter* v. *Mancusi*, 460 F. 2d 406 [2nd Cir 1972] and *Gonzalez* v. *Zelker*, 477 F. 2d 797 [1973].

In *Gonzalez* v. *Zelker*, the Second Circuit espoused the Supreme Court's test word for word.

> "Although the showing of a single photograph is impermissibly suggestive our inquiry must be whether, *under all the circumstances*, it gave rise to a very substantial likelihood of irreparable misidentification" (at 801).

Petitioner contends there is a conflict between the Circuits as to the standard to be applied under this Court's decision in *Simmons* v. *United States*, *supra*. Petitioner contends that the D.C. Circuit follows the test used in *United States* v. *Gambrill* (449 F. 2d 1148) [D.C. Cir. 1971]. That test places the burden upon the prosecution to show by *clear convincing* evidence that there was an independent basis for the in-court identification other than the impermissibly suggestive showup (*United States* v. *Gambrill*, *supra*, at 53).

Clearly, the "clear and convincing" test is not necessarily the test that the Second Circuit follows nor is it the test that this Court has fashioned.

But, in any event, the New York State Court of Appeals has in effect apparently adopted the "totality of the circumstances" test (see *People* v. *Brown*, 20 N.Y. 2d 238; *People*

v. *Bellott*, 20 N. Y. 2d 600; *People* v. *Logan*, 25 N. Y. 2d 184; *People* v. *Beyer*, 25 N. Y. 2d 833 [further affirmed *United States ex rel. Beyer* v. *Mancusi*, 436 F. 2d 755]; *People* v. *Ganci*, 27 N. Y. 2d 418, 429), while placing the burden on the prosecution to establish an independent basis for in-court identification by *clear and convincing* proof (*People* v. *Burwell*, 26 N. Y. 2d 331, 336).

II. Any apparent conflict resolved by this Court's action in Neil v. Biggers, 409 U.S. 188

Petitioner argues that to quell the alleged conflict between the Circuits as to what test to follow—totality of the circumstances or clear and convincing evidence—this Court should grant certiorari in this case. Respondent respectfully opposes such request.

It has been frequently said in the past that where there is such a square conflict, "the Supreme Court grants certiori irrespective of the importance of the question of law involved" (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States 629 [Wolfson and Kurland ed. 1951]. See also: Stern and Gressman, Supreme Court Practice, 101 [1st Ed. 1950]).

But there is increasing evidence that the existence of a conflict, without more, is not always enough to convince the Court that certiorari should be granted (Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465 [1953]). Mr. Justice Harlan has stated that:

> "even where a true conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Court of Appeals. . . . The nub of these qualifications is that a conflict of decision may safely be relied on as a ground for certiorari only in instances where it is clear that the

> conflict is one that can be effectively resolved *only* by the prompt action of the Supreme Court *alone.*" (Mr. Justice Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australia L.J. 108 [1959]).

It is respondent's contention that with the decisions of *Stovall, supra, Simmons, supra* and a further clarification by *Neil* v. *Biggers, supra* the purported conflict with cases following the *Gambrill* test becomes moot because a conflict with a decision which has been discredited or which has lost all weight as authority by reason of intervening decisions of the Supreme Court will not be grounds for certiorari to issue (Gressman and Stern, Supreme Court Practice 157 [4th ed. 1969]).

III. The instant case is not the proper case to decide the apparent conflict

A direct conflict between the decision of the Court of Appeals of which review is being sought and a decision of this Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari. But here, the Court of Appeals of the Second Circuit's decisions, where review was sought and pronounced, do not conflict with this Court's test, but rather it is the Court of Appeals of the District of Columbia which has apparently espoused a different test. Therefore, respondent argues the proper case for review of the test, if one is needed at all, is not *Gonzalez* but rather a case arising from the District of Columbia Circuit (*Ash* v. *United States*, 41 U.S.L.W. 3390), which came from that Circuit and was returned there for further hearings.

Finally, petitioner contends that to uphold the *Simmons* test used in *Gonzalez* would merely be dicta as to the issue of the conflict between the Circuits in which test to

use. The Circuits that may use the "clear and convincing" test will still not have been explicitly reversed and directed to use the proper test as fashioned in *Simmons* v. *United States.*

IV. Using the totality of the circumstances test, petitioner was not denied due processs of law by the in-court identification by Mrs. D'Amora of Gonzalez

The rules applicable to pre-trial photographic identifications were codified by this Court in the *Simmons* case, *supra.* In that case, this Court relied heavily upon its prior decision in *Stovall* v. *Denno, supra.*

Basically, of course, the rule is one founded on the due process requirements of the Fifth and Fourteenth Amendments. As we read these rules, this Court determined that there was nothing improper per se in pre-trial photographic identifications. However, such procedures may, in an extreme case, deprive a defendant of due process of law.

This Court in *Simmons* stated:

> ". . . We hold that each case must be considered on its own facts, and that convictions based on the witness' identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

This Court continually points to the fact that the evil possible in an improper procedure is misidentification—the identification of the innocent.

It should also be noted that in the *Simmons* case, this Court pointed to the use of cross-examination as the major tool to prevent the identification at trial of innocent persons.

It was stated:

> "The danger that use of the technique [photographic identification] may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the methods potential for error."

The danger again is misidentification at the investigation stage. Later stated in *Simmons*:

> "Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedures employed may have, in some respects, fallen short of the ideal."

There have been numerous cases both in this Court, State courts, and in the Second Circuit Court of Appeals, which have applied this standard to specific factual allegations. For example, the rulings in the *Springle case (United states ex rel. Springle* v. *Follette*, 434 F. 2d 1380; *United States ex rel. Beyer* v. *Mancusi, supra;* and *Phipps* [*United States ex rel. Phipps* v. *Follette*, 428 F. 2d 912]) indicate clearly, as we read them, that the procedure must be of a radical, almost intentional deprivation of the due process right before an in-court identification will be suppressed.

For example, in the *Phipps* case, *supra*, Judge Friendly stated:

> "The effort must be to determine whether, before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness' mind that he is able to rely on it at trial without much, if any, assistance from its successor" (p. 915).

In *Phipps*, the witness saw the relator in that case for 20 to 30 seconds, part of which time he was fighting with a co-defendant. Within a very short time, he saw the co-defendant whom he had a much better look at, and Phipps, together in a two man showup. He identified both. He later saw Phipps at a preliminary hearing and testified that his identification was not because he saw Phipps in the showup.

It is obvious the District Court was attempting in this case to delve into and to determine the mental process of a witness. It is respectfuly submitted that the interrogratories taken of the witness in this case and her answers to the questions put to her by the Magistrate in Virginia are extremely important in determining her mental process at the time of trial.

If we look further to the ruling of the Court in the *Rivera* case (*United States ex rel. Rivera* v. *McKendrick*, 448 F. 2d 30), we find an example of one of the few cases where an in-court identification was determined to be, at least on the record before the Court, inadmissible unless the People could prove its admissibility at a later hearing.

In that case, as we view it, there were a large number of questions left open before this Court. For example, an unnecessary hospital identification was conducted but the result of that procedure was unknown. The manner used in presenting photographs in *Rivera* appears to have been suggestive on its face. Further, it was unknown whether or not the victim picked *Rivera* from a spread of photographs.

In *Foster* (*Foster* v. *California*, 394 U.S. 440), we find a classic procedure pointing inexorably to unfairness. The witness in that case could not identify the defendant in an unfair lineup nor could he identify the defendant in a

showup. Until later in another lineup where the defendant was the only person who had been in the prior lineup was the victim able to make an identification.

This Court in that case cited the *Caruso* case (*People* v. *Caruso*, 68 Cal. 2d 183, 188, 65 Cal. Rptr. 336, 340, 436 P. 2d 336, 340 [1968] as follows:

> "We do no more than recognize . . . that unfairly constituted lineups have in the past too often brought about the conviction of the innocent."

Does the instant case mirror the *Foster, Rivera* situation or does it more closely coincide with the factual situations in *Springle, Beyer, Phipps* and, indeed, in *Simmons* itself?

It is the respondent's position that considering all the factors involved, and comparing the facts before the Court with the facts of these cases, the answer is obvious. The procedure in this case did not deprive the relator of due process of law.

We respectfully submit that on the facts of this case, the witness D'Amora had ample opportunity to view the defendant at the time of the crime (see: *Simmons, supra; Beyer, supra; United States ex rel. Anderson* v. *Mancusi*, 413 F. 2d 1012; *United States ex rel. Valentine* v. *Zelker*, 322 F. 2d 440).

We further respectfully submit the description given by the witness D'Amora which is subject to much greater analysis in the prior papers submitted by the respondent in the District Court, can only be termed a very accurate description (see: *Beyer, supra; United States ex rel. Williams* v. *Lavallee*, 415 F. 2d 643, *cert. den.* 397 U.S. 997, *United States ex rel. Rutherford* v. *Deegan*, 406 F. 2d 217, *cert. den.* 385 U.S. 93).

We further submit in relation to that identification that there is little or no evidence on the record that there was an initial uncertainty as to the identification (see: *Foster ,supra; Anderson, supra; United States ex rel. Geralds* v. *Deegan*, 307 F. 2d 56).

It should be noted also at this point that the identification witnesses at the trial were subjected to extremely lengthy cross-examination.

It would also seem that the learned Magistrate practically ignored the interrogatory responses of the witness, D'Amora, submitted as the Court's exhibit number 2, at the hearing.

A relevant excerpt from the interrogatories pages 4 and 5 states:

> "The Court: When you testified at the trial and identified Manuel Gonzalez as the man who approached you at the switchboard and eventually put on the ski mask, were you positive in fact, that he was that man?
>
> Mrs. D'Amora: Yes, I was.
>
> The Court: Are you positive today that your identification of Manuel Gonzalez was correct?
>
> Mrs. D'Amora: At the time I identified him, I made my identification as what happened in the office.
>
> The Court: Are you positive today that the identification that you gave in the trial is correct?
>
> Mrs. D'Amora: Yes.
>
> The Court: Did anything that occurred between the time of the crime and the time you testified at

the trial influence you in making an identification of Manuel Gonzalez?

Mrs. D'Amora: There wasn't.

The Court: No?

Mrs. D'Amora: No.

The Court: If you had not seen any photographs of Gonzalez between the time of the crime and the time you testified at trial, would you have been able to identify him?

Mrs. D'Amora: To the best of my knowledge as of the day he walked into my office, yes.

The Court: All right: Did you see either of the two men who committed the robbery in the courthouse prior to your testifying at the trial?

Mrs. D'Amora: I'm sorry, would you repeat that?

The Court: Did you see either of the two men who committed the robbery in the courthouse prior to your testifying at the trial? (pause)

In other words, did you see them before you went on the witness stand to identify them?

Mrs. D'Amora: Yes, I did. They were walking and I was sitting in the corridor—and they were walking in—on the other side of the room.

The Court: Could you have identified Gonzalez in court if you had not seen this photograph in the Grand Jury? (pause)

I'll repeat that question. Could you have identified Gonzalez in court if you had not seen his photograph in the Grand Jury?

Mrs. D'Amora: Yes.

The Court: Could you have identified Gonzalez in court if you had not seen his photograph prior to testifying at the trial?

Mrs. D'Amora: Yes.

The Court: Did seeing Gonzalez' photograph in the Grand Jury influence your identification of him at the trial?

Mrs. D'Amora: No.

The Court: Did seeing Gonzalez' photograph prior to your testimony influence your identification of him at the trial?

Mrs. D'Amora: No.

The Court: If you had not seen any photographs of Gonzalez, would you have been able to identify him at the trial?

Mrs. D'Amora: At that time, yes."

Although the interrogatories revealed that the witness' present recollection of the personages involved in the identification might be dim, she surely knew that she was correct at the time that she made the identification. Additionally, she revealed that her identification was in no way tainted by any photographs shown to her. She was positive of her identification of Gonzalez at the scene and could have identified him without photographs.

In *Neil* v. *Biggers* (*supra*), the defendant was convicted after a jury trial where part of the evidence adduced consisted of the victim's visual and voice identification of the defendant in a stationhouse showup seven months after the incident. The case went through the State system to this Court, where an affirmance was made by a 4-4 decision.

A federal habeas corpus petition revived the litigation. The Federal District Court, after a hearing, held the stationhouse identification procedure so suggestive as to violate due process and accordingly set aside the state conviction. The Court of Appeals affirmed (448 F. 2d 91 [1971]).

This Court's decision was relevant here in two respects:

(1) The court re-examined the lower court's findings by addressing itself to the merits and delved into the factual background. This, as explained by Justice Brennan's dissent, was a departure from the practice of the court. The implication is clear that the court is rolling back the threshold of examination in the identification area where facts have constitutional significance.

(2) The definition of what constitutes a deprivation of a defendant's due process rights in the identification area has been narrowed, especially where the challenged prosecutorial action (photo at grand jury) occurred prior to the advent of United States v. Wade, 388 U.S. 218 and *Stovall, supra.* The central question was not whether the procedures were suggestive, but whether, under the totality of the circumstances, the identification made gave rise to a clear danger of mistaken identification.

As applies to the case at bar, and in response to petitioner's brief, we submit that:

(1) The Circuit Court was not limited by the facts as determined by the District Court, where those conclusions made upon facts were erroneous.

(2) Alternatively, using standards in *Biggers* (*supra*), the Circuit Court could re-examine the facts and reverse on the basis that the findings of the District Court were clearly erroneous, in that the identification procedures herein did not mar the reliability of Mrs. D'Amora's identification of Gonzalez' part in the robbery or give rise to the danger of mistaken identification under the *totality of the*

circumstances, even though the photo showup might have been suggestive.

I. In Footnote #3 the majority ,through Justice Powell in *Biggers* (*supra*), at 379, says:

> "This rule of practice, under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts, is a salutary one to be followed where applicable. We think it inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them. Moreover, this a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below) and where the evidentiary hearing in the District Court purported to be 'confined' to two specific issues which we deem not controlling."

Here, in due deference to petitioner's brief, the Circuit Court was not proscribed from examining the factual findings of the District Court. This was a habeas corpus proceeding where factual findings were overlaid upon an already well developed state record. The findings of fact fit the definition above in that they are not elemental facts, but couched in constitutionally significant language.

Reiterating, the description given by Mrs. D'Amora cannot be really termed inaccurate in view of Mrs. D'Amora's agitated condition. Similarly, the record in the District Court only establishes the present uncertainty of identification. The initial certainty remains through Mrs. D'Amora's answers to the interrogatories—that she was sure of her identification at that time, which was totally ignored by the magistrate and District Court below.

Turning again to *Biggers supra*, this Court synopsized the fulcrum point of the decision as follows:

> "We turn, then, to the central question, whether under the ['totality of the circumstances'] the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Applying these factors, we disagree with the District Court's conclusion."

Assuming, *arguendo*, a suggestive confrontation procedure here, examine the factors indicating reliable identification.

The description of the petitioner was not perfect, given in D'Amora's agitated condition, but was within one or two inches of the petitioner's height, accurately described his stocky build and was within a year on age. She did, however, mistake the hair color.

The viewing was in a well lighted office from a distance varying between twelve feet to one foot . Petitioner was pointing a gun at her, so D'Amora certainly was attentive.

The first time D'Amora saw the petitioner in person after the incident was at the trial. As shown by the interrogatories, she is presently sure that her identification was accurate. She was also subjected to extensive cross examination on the point.

The District Court's conclusions of the critical facts were erroneous as being unsupported by the record of the hearing and the trial record established through the highest court of the State of New York.

In addition, the constitutionally significant point here is Mrs. D'Amora identified the picture of the petitioner within the parameters set down by *Biggers* (*supra*). Factually, *Biggers* is more distant from arguing proper identification than the case at bar. There the observation at the crime scene was short in time in dim light. The description of the defendant was general at best. The identification took place at a showup after a hiatus of seven months. Yet, the Court held the identification reliable.

Here the first identification took place only a short two months after the incident before the grand jury. Mrs. D'Amora was shown two photographs and she pointed to a picture of the petitioner as being one of the robbers. At least this identification sealed her testimony at an early point when the incident was still fresh in her mind.

Later, in August 1967 immediately prior to trial, the prosecutor, in his office, showed several of the witnesses photographs of the perpetrators and asked if any of the witnesses could recognize either or both of the robbers. Some of the witnesses were unable to identify anyone, but Mrs. D'Amora apparently picked out the defendant.

Thus, assuming the later photographic identification was suggestive, looking at all of the facts, including the interrogatory responses and the trial in-court identification, the conclusion must be that D'Amora's identification was reliable.

Accordingly, and based on all the foregoing, the defendant-relator was not deprived of his right to due process of

law by the testimony of the witness D'Amora identifying him as one of the two robbers.

V. No danger or irreparable harm or mistaken identification in the instant case

The theme that recurs time and time again throughout this Court and of the lower courts in identification due process cases is the possibility of the conviction of the innocent. Initial misidentification at the investigative stage under circumstances where that misidentification is "irreparable" are the evils condemned. The question then becomes one of accuracy of the identification. Numerous decisions have alluded to other factors in the case bolstering or supporting the identification testimony demonstrating that it is correct, and that there is no misidentification involved.

In the case at bar, the respondent at the hearing proved, at least *prima facie*, that the confession given by the relator within a short time after his arrest was voluntary in nature, and further it was taken under circumstances lawful at the time, and the police made a greater effort than was required at the time to both inform the defendant of his rights, and to preserve those rights.

This confession, we submit, should have been admitted at the habeas corpus hearing for a number of reasons: Firstly, it clearly and irrevocably demonstrates, both by its contents and by the property recovered as a result of it, that the identification testimony of Marguerite D'Amora was correct, and under no circumstances a misidentification of an innocent person. Therefore, we submit it was relevant before the magistrate.

Secondly, a habeas corpus hearing is not per se an appeal. Obviously the Federal District Court on habeas corpus petitions is not limited exclusively to the state court

record for, indeed, in this case a further record was made before a magistrate to whom this matter was referred by the Hon. Irving Ben Cooper.

Thirdly, the confession being relevant and voluntary was admissible in habeas corpus even though it might be inadmissible at a trial of the guilt or innocence of the relator.

Again, we refer to the very nature of habeas corpus; this great writ cuts through many procedural norms to reach the gravamen of a situation in determining the legality or illegality of a man's incarceration. It is and must be, because of its great power and because of its use as a last resort, a proceeding which seeks justice in its purest sense, both for the petitioner and for the governmental agency-respondent.

We do know now that confessions taken in violation of the *Miranda* rule are admissible in some instances. For example, this Court has determined that they may be admissible during a state court trial as a prior inconsistent statement.

Habeas corpus courts have determined that they are admissible in extradition proceedings (see: *United States ex rel. Vitiello* v. *Flood*, 374 F. 2d 554). Habeas corpus does not involve the introduction of evidence against "another." It does not punish in the penal sense any person. It seeks the truth.

In this case, the confession of the relator is an important element in finding the truth of this situation.

It has been and remains the People's position in relation to this confession that the rule of retroactivity announced by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719, mandating that the *Miranda* requirements apply to all

"trials" subsequent to the date of *Miranda* has been abrogated by later decisions of this Court to such an extent and with consistency that the *Johnson* rule has been, in fact, overruled and that the confession at the time it was offered to the magistrate would have been admissible in any court on any issue.

Subsequent to *Johnson*, this Court decided *Jenkins* v. *Delaware*, 395 U.S. 214, wherein the Court indicated that *Miranda* would not apply to re-trials which occurred subsequent to the date *Miranda* was decided.

A true application of the *Johnson* rationale would have had *Miranda* rules apply to such trials. In addition to that case, this Court decided *Desist* v. *United States*, 394 U.S. 244; and *Kaiser* v. *New York*, 394 U.S. 280, rehearing denied 394 U.S. 1025, concluding that the effective date of new rules was not the trial time but when the police action complained of occurred. Obviously the date of trial is a purely fortuitous determination having no bearing and being, in fact, irrelevant to the question of retroactivity.

We will not further take up the time of this Court to delve into the considerations given by this Court to retroactivity issues. It is, we maintain, self-evident that considering those issues, the trial date is absolutely meaningless (see: *Stovall* v. *Denno, supra;* see also in this regard *People* v. *Feinlowitz*, 29 N.Y. 2d 176). (See also on this issue *Williams* v. *United States*, 401 U.S. 646; and *United States* v. *White*, 401 U.S. 745.)

In conclusion, therefore, we submit that for all of these reasons, the confession was admissible at the habeas corpus hearing, and should have been considered therein as conclusively showing the accuracy of the complained of in-court identification. Accordingly, there was no danger of irreparable and mistaken identification in this case.

VI. Conclusory observations

The rule of due process is simply stated. The term is equivalent to the word "fairness". The defendant in a criminal action and, indeed, the People are entitled to fundamental fairness and, therefore, due process (see *Snyder* v. *Massachusetts*, 291 U.S. 97, at 105).

In the case at bar, the identification of the respondent by the witness D'Amora was not of any great importance until the time of trial. Indeed, the initial identification of the petitioner was from this confession and from the overwhelming amount of physical evidence recovered as a result of his confession. Immediately subsequent to the crime and up to and including the presentation to the Grand Jury, the witness' identification testimony was of very little importance to the People's case. Only when *Miranda* removed this evidence from the case was the testimony of Marguerite D'Amora crucial to the prosecution of this case.

The People were caught in the whipsaw of changing constitutional rules by this Court. A voluntary confession, the exclusive fruits of that confession, was the evidence depended on by the People to prove their case against Manuel Gonzalez, and the retroactivity rule of *Johnson* eliminated that overwhelming evidence.

We respectfully submit to this Court that no police agency in Nassau County deprived the defendant of any constitutional right. Every step was taken to preserve the rights of the relator in this Court and of his co-defendant, and the situation at the time of trial was not caused by any known wrong committed by a police agency or by any state officer.

The People respectfully request this Court to consider the confession at least to the extent that it shows the good faith of the People, and that it proves "necessary" the

pre-trial procedure used by the Assistant District Attorney which is so heartily complained of by the petitioner herein.

While not controlling in this case, nor even specifically applicable, we ask the Court to review the thinking of the Congress of the United States when it passed and sent to the President what has become Title 18, § 3502 of the United States Code, which mandates that "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court, ordained and established under Article III of the Constitution of the United States."

Consider the section with this Court's decision in *Kirby* v. *Illinois*, 406 U.S. 682. In that case, this Court decided that the *Wade* trilogy of cases so far as they concern the Sixth Amendment right of a defendant were not applicable to a defendant who had not been indicted at the time of the lineup (where no formal court proceedings or accusations had been instituted).

Kirby obviously negates to a large extent the import of the *Wade* rule because obviously *Wade* was not decided on a pre or post-indictment basis but upon a critical stage basis, more akin to the rationale of *Miranda* than to the rationale of *Massiah* (*Massiah* v. *United States*, 377 U.S. 201).

As Judge Medina stated in *United States ex rel. Beyer* v. *Mancusi*, supra, at 756:

> "The rules of *Wade, Gilbert and Stovall* should not be applied in such fashion as to constitute escape hatches for the guilty."

CONCLUSION

For the above stated reasons the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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